BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SALENA M. DENNIS	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,032,993
	)	
RUBBERMAID, INC.	)	
Self-Insured Respondent	)	

ORDER

Claimant requested review of the August 6, 2009 Award by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on November 20, 2009.

APPEARANCES

Brian R. Collignon, of Wichita, Kansas, appeared for the claimant. Terry J. Torline, of Wichita, Kansas, appeared for self-insured respondent (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found the claimant to have a 3 percent functional impairment to the body as a whole as a result of her hip injury which he found occurred "on or about December 1, 2006".[1] The ALJ specifically concluded that claimant did not sustain an injury to her low back and thus her permanency was limited to an average of the ratings assigned by Drs. Estivo and Murati solely for the hip injury. He went on to conclude that claimant was not entitled to a permanent partial general (work) disability because her employment with

[1] ALJ Award (Aug. 6, 2009) at 3. All references to impairment are to the whole body and were made pursuant to the 4th edition of the *Guides*. American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

respondent was terminated for cause thus limiting her impairment to her 3 percent functional impairment.

The claimant appealed this decision and asks the Board to modify the ALJ's findings with respect to the nature and extent of her disability. Claimant maintains she injured her back in her work-related accident and is entitled to an 11 percent functional impairment as assigned by Dr. Murati. She also contends that recent case law[2] compels the Board to modify the ALJ's Award and grant her a 92.5 percent permanent partial general (work) disability under K.S.A. 44-510e(a) based on her actual 100 percent wage loss and an 85 percent task loss.

Respondent challenges nearly all of the ALJ's findings with respect to the compensability of claimant's alleged injuries. Not only does respondent dispute the ALJ's findings regarding date of accident, personal injury arising out of and in the course of employment, and timely notice it also argues that even if claimant established a compensable injury, she is nonetheless not entitled to anything more than her functional impairment. Respondent contends the *Bergstrom* opinion does not apply to a factual situation where a claimant was terminated for cause or failed to exercise good faith in retaining her job. Thus, the ALJ's conclusion that claimant is not entitled to a work disability should be affirmed and her Award should be limited to the 3 percent whole body functional impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds the ALJ's Award sets out the facts and circumstances surrounding the claimant's alleged accidental injury and it is detailed, accurate, and supported by the record. The Board further finds that it is not necessary to repeat those findings in this order and merely adopts that factual statement as its own as if specifically set forth herein.

Respondent first takes issue with the claimant's claimed date of accident. Claimant initially asserted her accident occurred on December 1, 2006, but over the course of this claim, she has wavered on that date. It is true that she mentioned a variety of dates and at the Regular Hearing, she seemed to suggest that she continued to suffer injury to her back and hip as she performed her regular work duties.

K.S.A. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an

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[2] *Bergstrom v. Spears Manufacturing Company*, ___ Kan. ___, 214 P.3d 676 (2009).

award of compensation by proving the various conditions on which the claimant's right depends." K.S.A. 44-508(g) finds burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.[3]

After reviewing the entire record and considering the parties' arguments, the Board agrees with the ALJ's conclusion that claimant met her burden of establishing that she sustained a compensable injury on or about December 1, 2006. As the ALJ notes, the claimant's testimony that the accident occurred on December 1, 2006 is uncontroverted by any other witnesses. While it is true that respondent put forth some evidence that calls claimant's credibility somewhat into question, the ALJ was not convinced that her recitation of the events was compromised. The Board agrees. Claimant consistently described an accident occurring while at work in December 2006. As time passed and she was repeatedly questioned by respondent's counsel, she was less sure about the precise date of her accident. But the medical treatment she received commenced on December 14, 2006 and referenced a work-related injury. The greater weight of evidence supports claimant's contention that she was injured on or about December 1, 2006. The Board, therefore, affirms the ALJ's conclusion that claimant met her burden of establishing an accident occurred on December 1, 2006.[4]

Respondent also takes issue with the ALJ's conclusions that claimant sustained an accident arising out of and in the course of her employment and gave timely notice of accident. Respondent points to claimant's own testimony that immediately after the accident, she reported her injury to Cathy, the plant nurse. Claimant testified that she told Cathy about the accident and explained that she was not hurt, just embarrassed.[5] Respondent contends this testimony precludes any finding that claimant sustained an accidental injury and gave notice of an accident as she alleges. "Notification that she wasn't hurt is clearly different than notifying her supervisor that she suffered an injury as required by K.S.A. § 44-520."[6]

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[3] *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

[4] Respondent had stipulated that claimant's average weekly wage was $494.40 for a date of accident of December 1, 2006 but was not willing to stipulate to an average weekly wage for any other date of accident. In light of the Board's decision to affirm the ALJ's finding that claimant's date of accident was December 1, 2006, there is no need to address the issue of claimant's average weekly wage.

[5] R.H. Trans. at 10.

[6] Respondent's Brief at 4 (filed Oct. 7, 2009).

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Claimant's testimony that she notified Cathy, the plant nurse, of her accident is uncontroverted. Although at the time of that conversation claimant may have indicated that she was not hurt, just embarrassed, that declaration alone does not defeat her claim that she notified her employer that she sustained an accidental injury arising out of and in the course of her employment. The statute regarding notice merely requires that the employer be notified of an accident and is intended to afford the employer an opportunity to investigate the underlying facts and circumstances surrounding the accident.[7] Claimant did as the statute requires - she gave notice of her accident. Under these facts and circumstances, neither the ALJ nor the Board finds that her statements that she was not hurt invalidate her claim. Understandably, injured employees are not always immediately aware of the extent of their injuries. In this instance the medical records support her contention that she sustained injury while working in the manner she described. The Board, therefore, affirms the ALJ's finding with respect to timely notice of her accident.

Likewise the Board is persuaded that claimant proved it is more likely true than not that she sustained an accidental injury arising out of and in the course of her employment. In order for a claimant to collect workers compensation benefits he must suffer an accidental injury that arose out of and in the course of his employment. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when it is apparent to the rational mind, upon consideration of all circumstances, that there is a causal connection between the conditions under which the

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[7] *Pike v. Gas Service Co.*, 223 Kan. 408, 573 P.2d 1055 (1978).

work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.[8]

Although claimant's initial notification to her employer suggested she was not hurt, just embarrassed, that does not preclude her later realization that she was, in fact, injured. Her recitation of the event has been consistent. She required assistance to get to the human resources office and her pain complaints commenced at that time. The Board agrees with the ALJ's analysis and affirms the finding that claimant met her burden of showing that she was injured in an accident arising out of and in the course of her employment.

The remaining issue to be determined is the nature and extent of claimant's impairment. The ALJ expressed his findings as follows:

> This Court is going to adopt the opinions of Dr. Stein and Dr. Estivo, and finds that the [c]laimant has no permanent impairment to her lower back. The Court is going to give equal weight to the opinions of Dr. Estivo and Dr. Murati, concerning the [c]laimant's hip, and if the back condition is withdrawn from Dr. Murati's opinion, the [c]laimant has a six percent whole person impairment. In giving weight to both doctors, this Court finds that the [c]laimant has a three percent impairment of function to the body as a whole.[9]

While the ALJ was persuaded that claimant injured her hip in the accident, he did not find that she sustained a low back injury. And taking into consideration the ratings offered by Drs. Estivo (zero percent) and Murati (6 percent) the ALJ awarded claimant a 3 percent permanent functional impairment.

The Board has carefully considered the evidence contained within the record and finds the ALJ's Award should be modified. The Board is not persuaded that claimant has proven that it is more likely than not that she sustained permanent injury to either her hip or her back as a result of her December 1, 2006 accident. Dr. Estivo recommended that claimant have x-rays, a bone scan and an MRI. The bone scan revealed no abnormalities while the MRI revealed only some minimal bursitis bilaterally. Even claimant's own testimony at the regular hearing indicates that whatever back pain she had after this accident has resolved.[10] Indeed, after leaving respondent's employ she returned to work at several different employers performing work that she contends exceeded the restrictions that Dr. Murati would later impose. Both Drs. Estivo and Stein have testified that whatever

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[8] *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

[9] ALJ Award (Aug. 6, 2009) at 5.

[10] R.H. Trans. at 17, 26.

hip problem claimant might have had has resolved and has left her with no permanency. The only physician who has imposed a permanent impairment is Dr. Murati, an individual who was retained by claimant's counsel. Under these facts and circumstances, the Board is more persuaded by the testimony offered by Dr. Estivo. Accordingly, the ALJ's Award is modified to reflect a zero percent permanent impairment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated August 6, 2009, is affirmed in part and modified in part as follows:

The entirety of the ALJ's Award is affirmed with the exception of the issue of permanent impairment. The ALJ's finding of 3 percent permanent functional impairment is modified to a zero percent permanent functional impairment.

The Board notes that the ALJ did not award claimant's counsel a fee for his services. The record does not contain a fee agreement between claimant and her attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his0 written contract with claimant to the ALJ for approval.

IT IS SO ORDERED.

Dated this _____ day of December 2009.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Brian R. Collignon, Attorney for Claimant
Terry J. Torline, Attorney for Self-Insured Respondent
John D. Clark, Administrative Law Judge